

No. 12610

2653

United States
Court of Appeals
for the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

BURNHAM ENERSEN and NINA W. ENER-
SEN,

Respondents.

Transcript of Record

**Petitions to Review Decisions of the Tax Court
of the United States**

FILED

NOV - 1 1950

PAUL P. O'BRIEN,

CLERK

No. 12610

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Court of Appeals
for the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Docket No. 20978

BURNHAM ENERSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES

For Petitioner:

HENRY D. COSTIGAN, ESQ.,

STANLEY MORRISON, ESQ.,

GORDON M. WEBER, ESQ.

For Respondent:

EARL C. CROUTER, ESQ.

DOCKET ENTRIES

1948

Nov. 16—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 18—Copy of petition served on General Counsel.

Nov. 16—Request for Circuit hearing in San Francisco, filed by taxpayer. 11/22/48. Granted.

Dec. 21—Answer filed by General Counsel.

Dec. 27—Copy of answer served on taxpayer. San Francisco calendar.

1949

Sept. 9—Hearing set Nov. 7, 1949—San Francisco, California.

Nov. 7—Hearing had before Judge Harron on merits. Consolidated with Dkt. 20979 for hearing. (Submitted by stipulation of facts.) Stipulation of facts with Joint Exhibits 1-A thru 4-D attached thereto, filed. Briefs due 12/28/49. Replies 1/26/50.

Dec. 7—Transcript of hearing 11/7/49 filed.

Dec. 21—Brief filed by General Counsel.

Dec. 22—Brief filed by taxpayer. Copy served.

1950

- Jan. 20—Reply brief filed by taxpayer. Copy served.
- Jan. 25—Reply brief filed by General Counsel.
- Jan. 26—Memorandum findings of fact and opinion rendered, Judge Harron. Decision will be entered that there are no deficiencies. Copy served.
- Jan. 27—Decision entered. Judge Harron. Div. 13.
- Apr. 21—Petition for review by U. S. Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.
- May 5—Proof of service of petition for review filed. (Taxpayer.)
- May 5—Proof of service of petition for review filed. (Counsel for Taxpayer.)
- May 24—Motion for extension to July 20, 1950, to prepare and transmit the record filed by General Counsel.
- May 24—Order enlarging time to July 20, 1950, to prepare and transmit the record, entered.
- July 3—Statement of points filed by General Counsel with service acknowledged thereon.
- July 3—Statement re diminution of record filed by General Counsel with service acknowledged thereon.

Docket No. 20979

NINA W. ENERSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1948

Nov. 16—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 18—Copy of petition served on General Counsel.

Nov. 16—Request for Circuit hearing in San Francisco, filed by taxpayer. 11/22/48 Granted.

Dec. 21—Answer filed by General Counsel.

Dec. 27—Copy of answer served on taxpayer. San Francisco calendar.

1949

Sept. 9—Hearing set Nov. 7, 1949 in San Francisco, California.

Nov. 7—Hearing had before Judge Harron on merits. Consolidated with Dkt. 20978. (Submitted by Stipulation of Facts.) Stipulation of facts filed at hearing with joint Exhibits 1-A thru 4-D attached thereto. Briefs due 12/28/49. Replies 1/26/50.

Dec. 7—Transcript of hearing 11/7/49 filed.

Dec. 21—Brief filed by General Counsel.

Dec. 22—Brief filed by taxpayer. Copy served.

1950

Jan. 20—Reply brief filed by taxpayer. Copy served.

Jan. 25—Reply brief filed by General Counsel.

Jan. 26—Memorandum findings of fact and opinion rendered, Judge Harron. Decision will be entered that there are no deficiencies. Copy served.

Jan. 27—Decision entered. Judge Harron. Div. 13.

Apr. 21—Petition for review by U. S. Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

May 5—Proof of service of petition for review on taxpayer filed.

May 5—Proof of service of petition for review on counsel for taxpayer filed.

May 24—Motion for extension to July 20, 1950, to prepare and transmit record filed by General Counsel.

May 24—Order enlarging time to July 20, 1950, to prepare and transmit record, entered.

July 3—Statement of points filed by General Counsel with service acknowledged thereon.

July 3—Statement re diminution of record filed by General Counsel with service acknowledged thereon.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, San Francisco, IRA:90-D:WBH, dated October 26, 1948, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with residence at 2642 Baker Street, San Francisco, California. The returns for the period here involved were filed with the Collector for the First District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on October 26, 1948.

3. The taxes in controversy are income taxes for the calendar years 1944 and 1945 and in the amounts of \$237.38 for 1944 and \$1,150 for 1945.

4. The determination of the taxes set forth in said notice of deficiency is based upon the following error:

In determining the tax liability of the petitioner for the years 1944 and 1945 the Commissioner

erroneously held that the petitioner could not use the tax computation method set forth in Section 107(a) of the Internal Revenue Code with respect to his taxable share of certain compensation of a partnership of which he was a member, consisting of certain fees for personal services covering in each case a period of thirty-six calendar months or more, which fees were in each case received by said partnership in one taxable year to the extent of at least 80 per centum of the total fees for the said services; such holding was erroneously based on the ground that petitioner had not been a partner in said partnership for thirty-six calendar months or more prior to the dates of receipt of such fees, and upon the erroneous finding that petitioner did not have the right to participate in fees earned by the partnership prior to August 1, 1943.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner became a partner in the law partnership of McCutchen, Thomas, Matthew, Griffiths & Greene on August 1, 1943.

(b) The petitioner and said partnership have both at all times followed the cash receipts and disbursements method of accounting in their tax returns and in any and all books of account kept by said partnership or by petitioner. Both petitioner and said partnership make their tax returns on a calendar year basis and have always done so.

(c) For approximately ten years prior to August 1, 1943, the petitioner had been employed by said partnership as a lawyer.

(d) During the period from January 1, 1940, to August 1, 1943, the petitioner received as his entire compensation in such employment a percentage of the profits of the said partnership. Prior to January 1, 1940, petitioner was paid a salary by said partnership.

(e) During the calendar years 1944 and 1945, the partnership received several amounts from clients for personal services performed over periods of several years. In each of these instances at least 80 per centum of the total compensation for personal services covering a period of thirty-six months or more (from the beginning to the completion of such services) was received by the partnership in a single taxable year.

(f) In so far as it is legal to do so, all fees received by any member of said partnership in any calendar month are pooled in a single fund which is first used to pay all expenses of such month, and the balance is then or at the end of the year divided among all of the partners and all of those employees who are employed on a profit sharing basis. Each such division is in accordance with the percentage shares as agreed upon by the partners and in effect during the month in which the said fees are received. Partners and profit-sharing employees share in such division of all fees received while

they are entitled to a share in the partnership profits; conversely, when partners or employees cease to be such by death or retirement or otherwise, they do not share in fees received after the month in which the cessation occurs.

(g) The fee division procedure outlined in paragraph (f) has been followed by the said partnership for many years and at all times herein mentioned.

(h) In accordance with said procedure described in paragraph (f) above each of the fees described in paragraph (e) above was divided among all partners and employees entitled to share in profits at the time of its receipt.

(i) From such division of those certain fees described in paragraph (e) above the petitioner received \$3,561.13 in 1944 and \$10,791.68 in 1945.

(j) Petitioner was married in 1935. Petitioner and his wife resided in California at all times herein mentioned, including all of 1944 and 1945. Said amounts received by petitioner as alleged in paragraph (i) above constituted community property.

(k) Petitioner computed his income taxes for each of the years 1944 and 1945 by first allocating his partnership share of each of the fees described in paragraph (e), above (aggregating the amounts alleged in paragraph (i), above), received in such taxable year (1944 or 1945 as the case might be)

ratably over that part of the period during which the services for which it was received were performed which preceded the date of receipt of such fee. Petitioner next treated as his income his community property half of each total amount so allocated to each of the years 1935 to 1945, inclusive, and all of each total amount so allocated to each of the years 1931 to 1934, inclusive, in each such case treating it as income for the year to which so allocated. (In view of the fact that all of said partnership share constituted community property, because received in 1944 or 1945, after petitioner's marriage, it may be that petitioner should have treated as his income only one-half of each of the amounts so allocated to 1931-34; however, because of the small amounts involved, this would not change the aggregate taxes attributable to these years, 1931-34, for both petitioner and his wife.) Petitioner then determined the taxes attributable to such amounts when so treated as his income for such years 1931-45 and substituted the aggregate of the taxes so attributable thereto for the tax which would otherwise have been payable on account of receipt of the said fees during the taxable year of receipt (1944 or 1945, as the case might be).

(1) In following the procedure outlined in paragraph (k) above, petitioner's portion of the part of said partnership share allocated to each year was as follows:

	From Fees Rec'd in 1944	From Fees Rec'd in 1945
1945	\$	\$ 849.78
1944	141.98	1,508.42
1943	403.26	1,508.41
1942	403.25	699.16
1941	391.42	59.36
1940	346.45	76.62
1939	94.20	82.50
1938 .....	....	78.91
1937 .....	....	78.91
1936 .....	....	78.91
1935 .....	....	78.91
1934 .....	....	157.83
1933 .....	....	157.83
1932 .....	....	157.83
1931 .....	....	118.98
	<hr/>	<hr/>
	\$1,780.56	\$5,691.76

Wherefore, the petitioner prays that this court may hear the proceeding and determine that there are no deficiencies due from the petitioner for the years 1944 or 1945.

/s/ HENRY D. COSTIGAN,

/s/ STANLEY MORRISON,

/s/ GORDON M. WEBER,

Counsel for Petitioner.

State of California,
City and County of San Francisco—ss.

Burnham Enersen, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be on information and belief, and that those he believes to be true.

/s/ BURNHAM ENERSEN.

Subscribed and sworn to before me this 8th day of November, 1948.

[Seal] /s/ EVA L. NELSON,
Notary Public in and for the City and County of
San Francisco, State of California.

EXHIBIT A

Form 1230 (Rev. Sept. 1945)

SN-IT-1

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco 5, California

Oct. 26, 1948.

Office of
Internal Revenue Agent in Charge
San Francisco Division
IRA:90-D:WBH

Mr. Burnham Enersen
2642 Baker Street
San Francisco, California

Dear Mr. Enersen:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1944, and December 31, 1945, discloses a deficiency of \$1,387.38 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California—for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner.

By /s/ F. M. HARLESS,
Internal Revenue Agent in
Charge .

Enclosures:

Statement
Form 1276
Form 870

Statement

San Francisco
IRA :90-D:WBH

Mr. Burnham Enersen
2642 Baker Street
San Francisco, California

Tax Liability for the Taxable Years Ended December 31, 1944, and December 31, 1945.

Year	Deficiency
1944 Income Tax	\$ 237.38
1945 Income Tax	1,150.00
	<hr/>
Total	\$1,387.38

In making this determination of your income tax liability, careful consideration has been given to your protest filed May 14, 1948, and to the statements made at the conferences held on June 11, 1948, and August 4, 1948.

A copy of this letter and statement has been mailed to your representatives, Messrs. Henry D. Costigan, Stanley Morrison and Gordon M. Weber, 351 California Street, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Adjustments to Net Income

Year: 1944

Net income as disclosed by return \$5,739.21

No change is made in the net income reported
on the return.

Explanation of Adjustments

(a) It is noted that distributive income from the law partnership, McCutcheon, Thomas, Matthew, Griffiths and Greene, San Francisco, California, was reported on your return as follows:

	Amount allocated to to prior years under section 107(a) Internal Revenue Code	Balance	Total dis- tributive share
Distributive income	\$3,277.17	\$9,020.49	\$12,297.66
Your 1/2 community share	\$1,638.58	\$4,510.25	\$ 6,148.83

In computing your tax liability for the taxable year 1944 you deducted \$237.38 representing reduction in tax due to application of section 107(a) of the Internal Revenue Code, as shown below:

Tax on entire income at 1944 rates		
(including \$1,638.58 fees)		\$1,189.37
Adjusted gross income	\$6,239.21	
Less: Fees allocated to prior years	1,638.58	
Revised adjusted gross income	\$4,600.63	
Tax on \$4,600.63 (per Tax Table)		766.00
Portion of 1944 tax attributable to income allocated to prior years		\$ 423.37

Tax on income allocated to prior years:

Year	Income	Tax	
1943.....	\$ 403.26	\$ 97.99	
1942.....	403.25	21.57	
1941.....	391.42	49.32	
1940.....	346.45	13.72	
1939.....	94.20	3.39	
	<u>\$1638.58</u>	<u>\$185.99</u>	185.99

Reduction in tax by application of section 107(a)\$ 237.38

During the taxable year the partnership received fees of \$96,158.33 for services rendered over a period of 36 calendar months or more, the amount in each instance representing more than 80% of the total compensation for the services rendered. You reported the amount of \$3,561.13 as your distributive share of which \$3,277.17 was attributed to services in prior years and \$283.96 was applied to services in the taxable year 1944.

It is disclosed that from the year 1933 you were employed by the partnership on a straight salary basis and from January 1, 1940, you

Explanation of Adjustments—(Continued)

received a small percentage of the profits in addition to your salary; and on August 1, 1943, you were admitted as a partner participating in the profits and losses according to your pro rata share.

It is held that prior to August 1, 1943, you were an employee of the partnership and did not have the right to participate in fees earned by the partnership prior to that date. Since the period of your membership in the partnership is less than 36 calendar months, it is held that you do not qualify for relief under the provisions of section 107(a) of the Internal Revenue Code with respect to the fees earned since August 1, 1943. The reduction of \$237.38 in tax is, therefore, disallowed.

Computation of Tax
Year: 1944

Net income	\$5,739.21	
Less: Surtax exemption	1,000.00	
	<hr/>	
Surtax net income	\$4,739.21	
	<hr/>	
Surtax on \$4,739.21		\$1,032.19
Net income	\$5,739.21	
Less: Normal tax exemption	500.00	
	<hr/>	
Normal tax net income	\$5,239.21	
	<hr/>	
Normal tax, 3% of \$5,239.21		157.18
		<hr/>
Total tax		\$1,189.37
(a) Less: Reduction under section 107(a) of the Internal Revenue Code		0.00
		<hr/>
Correct income tax liability		\$1,189.37
Income tax disclosed by return, page 1 - line 6 (Original, Account No. 7714308 First California District) ..		951.99
		<hr/>
Deficiency of income tax		\$ 237.38

Adjustments to Net Income

Year: 1945

Net income as disclosed by return\$14,699.40
 No change is made in the net income reported on the return.

Explanation of Adjustments

(a) Your distributive share of income from the partnership McCutcheon, Thomas, Matthew, Griffiths and Greene, San Francisco, California, was reported on your return as follows:

	Amount allocated to prior years under section 107 (a) Internal Revenue Code	Balance	Total dis- tributive share
Distributive income	\$9,092.12	\$21,398.00	\$30,490.12
Wife's 1/2 community share (since 1935)	\$4,250.14	\$10,994.92	\$15,245.06
Your share	\$4,841.98	\$10,403.08	\$15,245.06

In computing your tax liability for the taxable year 1945 you deducted \$1,150.00 representing reduction in tax due to the application of section 107 (a) of the Internal Revenue Code, as shown below:

Tax on entire income at 1945 rates (including fees of \$4,841.98)	\$4,556.72
Net income	\$14,699.40
Less: Fees allocated to prior years	4,841.98
Revised net income	\$ 9,857.42
Tax on \$9,857.42—1945 rates	2,532.24
Portion of 1945 tax attributable to income allocated to prior years	\$2,024.48

Explanation of Adjustments—(Continued)

Brought forward\$2,024.48

Tax on income allocated to prior years:

Year	Income	Tax
1944.....	\$1,508.42	\$385.62
1943.....	1,508.41	403.80
1942.....	699.16	37.41
1941.....	59.36	7.48
1940.....	76.62	6.21
1939.....	82.50	2.97
1938.....	78.91	2.84
1937.....	78.91	2.84
1936.....	78.91	2.84
1935.....	78.92	2.84
1934.....	157.83	5.68
1933.....	157.83	6.31
1932.....	157.83	6.31
1931.....	118.37	1.33

\$4,841.98

\$874.48

874.48

Reduction in tax by application of section 107(a)\$1,150.00

During the taxable year 1945 the partnership received fees of \$178,-375.00 for services rendered over a period of 36 calendar months or more, the amount in each instance representing more than 80% of the total compensation for the services rendered. Your distributive share of the fees was \$10,791.68 of which \$1,699.56 was attributed to services for the taxable year 1944, and \$9,092.12 was allocated to services in prior years.

For the reasons stated in item (a) for the taxable year 1944, it is held that you do not qualify for relief under the provisions of section 107(a) of the Internal Revenue Code. The reduction of \$1,150.00 in tax is, therefore, disallowed.

Computation of Tax
Year: 1945

Net income	\$14,699.40	
Less: Surtax exemption	1,000.00	
	<hr/>	
Surtax net income	\$13,699.40	
	<hr/>	
Surtax on \$13,699.40		\$4,130.74
Net income	\$14,699.40	
Less: Normal tax exemption	500.00	
	<hr/>	
Normal tax net income	\$14,199.40	
	<hr/>	
Normal tax, 3% of \$14,199.40		425.98
		<hr/>
Total tax		\$4,556.72
(a) Less: Reduction under section 107(a) of the Internal Revenue Code		0.00
		<hr/>
Correct income tax liability		\$4,556.72
Income tax disclosed by return, page 1 - line 6 (Original, Account No. 3019467 First California District) ..		3,406.72
		<hr/>
Deficiency of income tax		\$1,150.00

Received and Filed T.C.U.S. November 16, 1948.

Served November 18, 1948.

[Title of Tax Court and Cause.]

Docket No. 20978

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. Denies that the determination of tax set forth in the notice of deficiency is based upon error as alleged in paragraph 4 of the petition.

5(a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Admits the allegations contained in subparagraph (c) of paragraph 5 of the petition.

(d) Admits that prior to January 1, 1940, the petitioner was paid a salary by the partnership; denies the remaining allegations contained in subparagraph (d) of paragraph 5 of the petition.

(e) Admits the allegations contained in subparagraph (e) of paragraph 5 of the petition.

(f), (g), (h) For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs (f), (g) and (h) of paragraph 5 of the petition.

(i) Denies the allegations contained in subparagraph (i) of paragraph 5 of the petition.

(j) Admits that the petitioner and his wife resided in California during 1944 and 1945; denies the remaining allegations contained in subparagraph (j) of paragraph 5 of the petition.

(k) Admits the allegations contained in subparagraph (k) of paragraph 5 of the petition, except that respondent denies the parenthetical matter set forth in this subparagraph commencing at the last line of page 5 of the petition and ending at line 8 of page 6 thereof.

(l) Denies the allegations contained in subparagraph (l) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

T. M. MATHER,

W. J. McFARLAND,

Special Attorneys, Bureau of
Internal Revenue.

Received and Filed T.C.U.S. December 21, 1948.

The Tax Court of the United States

Dockets No. 20978 and No. 20979

BURNHAM ENERSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

NINA W. ENERSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between the parties to the above-entitled causes that the facts hereinafter set forth shall be taken to be true and received in evidence in the trial of such cause, subject to the right of either party to introduce other and further evidence not inconsistent with the following facts:

(1) Both of the above-entitled causes involve the same years and identical facts and may be consolidated for purposes of hearing and of opinion. Burnham Enersen, hereinafter referred to as "petitioner," is the husband of Nina W. Enersen, hereinafter referred to as "petitioner's wife."

(2) Petitioner and petitioner's wife are both individuals with residence at 2642 Baker Street,

San Francisco, California. The Federal income tax returns of petitioner and petitioner's wife for the calendar years 1944 and 1945 were filed with the Collector of Internal Revenue for the First District of California.

(3) The notices of deficiency, copies of which are attached to each of the petitions herein as Exhibit A, were mailed to the petitioner and petitioner's wife on October 26, 1948.

(4) The taxes in controversy herein are income taxes for the years 1944 and 1945 and are in the amounts of \$237.38 for 1944 and \$1,150.00 for 1945 in the case of petitioner, and in the amounts of \$257.38 for 1944 and \$983.37 for 1945 in the case of petitioner's wife.

(5) For approximately thirteen years prior to August 1, 1943, the petitioner had been employed by the law partnership of McCutchen, Thomas, Matthew, Griffiths & Greene, as a lawyer.

(6) Prior to January 1, 1940, the petitioner was paid a monthly salary plus an annual Christmas bonus amounting to a part of a month's salary by said partnership.

(7) From January 1, 1940, to August 1, 1943, the amount of petitioner's compensation from said partnership was fixed in accordance with certain agreements, each covering a calendar year or portion thereof. Copies of such agreements are attached hereto as Exhibits 1-A, 2-B, 3-C and 4-D. During each such calendar year (or fraction

thereof) the percentage of net profits fixed by the applicable agreement exceeded the minimum salary guaranteed by such agreement so that petitioner received as his entire compensation for the calendar year 1940 the percentage of the profits of said partnership specified in Exhibit 1-A, for the calendar year 1941 the percentage of the profits specified in Exhibit 2-B, for the calendar year 1942 the percentage of the profits specified in Exhibit 3-C, and for the fractional calendar year from January 1, to August 1, 1943, the percentage of profits specified in Exhibit 4-D. The guaranteed amount specified in each such agreement was paid monthly and the balance of petitioner's compensation for each year was paid at the end of the year.

(8) The petitioner became a partner in said partnership on August 1, 1943, and since that date has at all times here material been a partner in said firm.

(9) From and after August 1, 1943, petitioner as a partner in said partnership has at all times here material received a specified percentage of the net profits of said partnership, which increased from 3.25% on August 1, 1943, to 5.4571% on December 31, 1945, such amounts being paid in part monthly and the balance at the end of the year.

(10) Petitioner and petitioner's wife and said partnership have at all times here material followed the cash receipts and disbursements method of accounting in their tax returns and in any and all

books of account kept by petitioner or by petitioner's wife or by said partnership. Petitioner, petitioner's wife and said partnership have at all times here material made their tax returns on a calendar year basis.

(11) During the calendar years 1944 and 1945, said partnership received several amounts from clients for personal services on separate legal matters, such services being performed in each case over periods of several years. In seven cases in 1944 and ten cases in 1945 at least 80 per cent of the total compensation for personal services covering a period of thirty-six months or more (from the beginning to the completion of such services) was received by the partnership in a single taxable year. In the case of the largest such amount received in 1945, petitioner himself during the period from September, 1943, to December, 1945, was one of the attorneys performing the services for which such amount was paid as compensation; and in the case of one of the largest such amounts received in 1944, petitioner during the period from January, 1940, to January, 1944, was one of the attorneys performing the services for which such amount was paid as compensation.

(12) In so far as it has been legal to do so (i.e., with the exception of certain executors' fees forbidden by law to be shared with attorneys who are not executors and other compensations which could not be shared for similar reasons, none of which fees are involved in this case) all fees and

payments of compensation by other parties received by any member of said partnership in any calendar month have been pooled in a single fund which has been first used to pay all expenses of such month, and the balance then or at the end of the year was divided among all of the partners and all of those employees who were employed on a profit-sharing or percentage-of-profits basis. Each such division has been in accordance with the percentage shares agreed upon by the partners and in effect during the month in which the said fees have been received. Each partner and profit-sharing employee has shared in such division of all net fees and profits received during any period in which he has been entitled to a share in the partnership profits according to such agreement of the partners; conversely, when a partner or employee has ceased to be such by death or retirement or otherwise, he has not shared in any fee or fees received after the month in which the cessation has occurred.

(13) The procedure for division of fees and profits outlined in paragraph (12) has been followed by said partnership for many years and at all times herein mentioned.

(14) Pursuant to said procedure described in paragraph (12) above, each of the fees described in paragraph (11) above was divided according to their respective percentages at the time of its receipt among all partners and employees then entitled to share in profits.

(15) From such division of those certain fees

described in paragraph (11) above (i.e., only those fees for personal services performed over periods of thirty-six months or more which were received to the extent of 80 per cent or more in a single taxable year) the petitioner received \$3,561.13 in 1944 and \$10,791.68 in 1945.

(16) Petitioner and petitioner's wife were married in 1935. Petitioner and his wife resided together in California at all times thereafter which are here material, including all of 1944 and 1945. Said amounts received by petitioner as stated in paragraph (15) above constituted community property acquired subsequent to 1927.

(17)(a) In his returns for 1944 and 1945 the petitioner computed his income taxes attributable to the fees described in paragraph (11) above by first taking his partnership share of each of such fees received in such taxable year (1944 or 1945, as the case might be), aggregating in each case the amount for such year alleged in paragraph (15) above, and by then allocating each such share of each such fee ratably over that part of the period of performance by said partnership of the services for which such fee was received which preceded the date of receipt of such fee. Petitioner next treated as his income his community property half of each total amount so allocated to each of the years 1935 to 1945, inclusive, and all of each total amount so allocated to each of the years 1931 to 1934, inclusive, in each such case treating it as income for the year to which so allocated. Petition-

er's wife treated as her income her community property half of each total amount so allocated to each of the years 1935 to 1945, inclusive, in each such case treating it as income for the year to which so allocated.

(b) Under the procedure followed by petitioner in said returns, as outlined in subparagraph (a) above, the portions of said partnership fees received in 1944 or 1945 (as the case might be) which were allocated by petitioner to the different taxable years were as set forth in the following table:

	From Fees Rec'd in 1944	From Fees Rec'd in 1945
1945	\$	\$ 849.78
1944	141.98	1,508.42
1943	403.26	1,508.41
1942	403.25	699.16
1941	391.42	59.36
1940	346.45	76.62
1939	94.20	82.50
1938 .....	.....	78.91
1937 .....	.....	78.91
1936 .....	.....	78.91
1935 .....	.....	78.92
1934 .....	.....	157.83
1933 .....	.....	157.83
1932 .....	.....	157.83
1931 .....	.....	118.37
	<hr/>	<hr/>
	\$1,780.56	\$5,691.76

The portions of said partnership fees received in 1944 or 1945 (as the case might be) which were allocated by petitioner's wife to the different taxable years were as set forth in the following table:

	From Fees Rec'd in 1944	From Fees Rec'd in 1945
1945	\$	\$ 849.78
1944	141.98	1,508.42
1943	403.26	1,508.41
1942	403.25	699.16
1941	391.42	59.36
1940	346.45	76.62
1939	94.20	82.50
1938 .....	.....	78.91
1937 .....	.....	78.92
1936 .....	.....	78.92
1935 .....	.....	78.92
	<hr/>	<hr/>
	\$1,780.56	\$5,099.92

(c) Petitioner in said returns then determined the taxes which would have been attributable to the respective amounts in each column of the table in subparagraph (b) above, if such amounts had been received by him as income in the respective years to which allocated in such column of such table in subparagraph (b) above, and substituted the aggregate of the taxes so attributable to the amounts in each such column for the tax which would otherwise have been payable on account of receipt of the total of such amounts during the taxable year of receipt (1944 or 1945, as the case

might be). Petitioner's Federal income tax returns for 1944 and 1945 referred to in paragraph (2) above, computed his taxes for said years on the basis of making such substitution. The same procedure was followed by petitioner's wife in her returns.

Dated: November 7, 1949.

/s/ HENRY S. COSTIGAN,

/s/ GORDON M. WEBER,
Counsel for Petitioner.

/s/ CHARLES OLIPHANT, ECC
Chief Counsel, Bureau of Internal Revenue, Coun-
sel for Respondent.

Filed T.C.U.S. November 7, 1949.

The Tax Court of the United States
Docket No. 20978 and Docket No. 20979

BURNHAM ENERSEN, NINA W. ENERSEN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Monday, November 7, 1949

Met, pursuant to notice, at 2:20 o'clock p.m.
Before: Hon. Marion J. Harron,
Judge.

Appearances:

HENRY D. COSTIGAN, and

GORDON WEBER,

Appearing on behalf of the Petitioners.

EARL C. CROUTER,

(Hon. Charles Oliphant, Chief Counsel,
Bureau of Internal Revenue),

Appearing for the Respondent.

PROCEEDINGS

The Clerk: I will call Docket No. 20978 and 20979, Burnham Enersen and Nina W. Enersen. Please state your appearances, gentlemen.

Mr. Costigan: Henry D. Costigan and Gordon Weber, appearing for Petitioners in both cases.

Mr. Crouter: And Earl C. Crouter for the Respondent in each case.

Mr. Costigan: If the Court please, the stipulation of facts which we will expect to file and can file now provides in Paragraph 1 that both of these cases involve the same years and identical facts and may be consolidated for purposes of hearing and of opinion. We should like to move now that that be done.

The Court: The motion is granted.

OPENING STATEMENT ON BEHALF OF PETITIONERS

By Mr. Costigan:

The wife's case, Mrs. Enersen's, is simply the

same as that of the Petitioner, because of the community property law, as in the Nielson cases this morning, your Honor. The facts are somewhat different from that case but primarily there is the same question of law involved; namely, the application of Section 107 to a partner's share of partnership earnings received after he became a partner but earned in part by services before he became a partner. The facts have some important differences, I think, and I would like to briefly mention what they are.

With respect to the Petitioner's—and I refer to the husband when I refer to Petitioner's—status, in this case he was employed by the partnership involved beginning in 1930. For a period of 10 years he was simply on a salary as an employee. Beginning January 1st, 1940, he was still an employee but he was compensated by a percentage of profits with a guaranteed minimum monthly account or salary, which he was to get in any event, but in every year following his percentage exceeded the minimum amount so that, in effect, his entire compensation was a percentage of profits.

Then on August 1, 1943, he was made a partner with an increased percentage in the profits. The fees involved and the tax years involved are 1944 and 1945 and there was, I think, seven fees received in the first of those years and ten in the second, or I may have that reversed but it is one way or the other. Each of those fees represented compensation for services performed by the partner-

ship over a period of more than 36 months, as required by Section 107, and in each case more than 80 per cent, or 80 per cent or more, was received in the one year 1944 or 1945, as the case might be. Mr. Enersen's share of those fees in that classification in 1944 was \$3,561.13. That is stipulated, and in 1945 it was \$10,791.68.

As your Honor can see, the services, the 36 months' period preceding receipt of each fee, did extend back beyond his entry into the partnership. However, it did not extend back beyond the period when he was first compensated with a share of profits, because that began in 1940, which was more than three years prior to the first taxable year here involved. Of course, in some cases the services were performed even in years prior to that.

It is our position that Section 107 applies directly to any cases where the partnership itself performed services over 36 months or more and received 80 per cent in a single year, but if that situation exists, then by its very terms, and I quote from the section, "The tax attributable to any part thereof which is included in the gross income of any individual" shall not be greater than it would have been, in effect, if it had been allocated back over the period of services.

As a result of this, both Mr. Enersen as to his community half and Mrs. Enersen as to hers allocated the fees back over the years involved. In the case of the 1944 fees they went back to 1939. In the case of the 1945 fees they went back to 1931. All

the facts on the subject are, we believe, covered by the stipulation.

I should therefore like to offer that for the record and call the Court's attention to the fact that there are four exhibits attached and incorporated by reference. They are joint exhibits so we have called them Exhibits 1-A, 2-B, 3-C, and 4-D.

The Court: The stipulation is received and made a part of the record and the exhibits attached to the stipulation are admitted in evidence.

(Whereupon the documents were marked for identification as Joint Exhibits 1-A, 2-B, 3-C, and 4-D and were received in evidence.)

JOINT EXHIBIT 1-A

Memorandum by Participant—1940

In order to link them still more closely with the business of the firm, and to give them a direct financial interest in its welfare, recognition is accorded to certain members of our staff of attorneys, in addition to Monthly Guaranties, in certain Participating Percentages, contingent, in each case, on their remaining members of the staff throughout the calendar year. The Monthly Guaranties are to be paid in lieu of salaries. The Participating Percentages will not be computed or paid until after the close of the calendar year. The total paid during the year by way of Monthly Guaranty is to be credited on the Participating Percentage, and settlement will be made for the balance.

The Participating Percentages are to be com-

puted on the year's "Net Fees Before Participation." In arriving at that figure all expenses for the year are to be deducted except Monthly Guaranties paid participants and except salaries paid to partners.

In order to safeguard the provision thus made for participants, it must be stipulated that the participating privilege does not constitute participants' partners, or amount to a contract of employment on an annual or other basis or restrict the partners' freedom of action in terminating any employment at any time; that it gives the participants no voice in firm decisions or right of access to books or right to receive detailed statements, and in any question of amounts or of computations the decisions of Price, Waterhouse & Co., or other certified accountants employed by the firm is to be final. Percentages are based on present conditions and it is contemplated that percentages may be changed at any time on notice to the participants affected and that other persons may be admitted to participation at any time as the partners may consider appropriate.

This memorandum is to receive the approval of the participant mentioned below and will be handed the Accounting Department for its guidance. The percentages paid participants are paid them by way of compensation only and not as parties to a joint business venture. The Accounting Department shall treat them accordingly for income tax and all other purposes. The participants should return the amounts received in their income tax returns as "Salaries, wages, etc." and not as "Income from a

partnership.” The amount is to be allocated to the year in respect of which paid, even though not actually paid until the following year after the books for the year in question shall have been closed.

Mr. Burnham Enersen, having been selected as a participant, his Monthly Guaranty is fixed at \$400.00 beginning January 1, 1940, and his Participating Percentage is fixed at 1.5 per cent, beginning with the calendar year 1940. This memorandum shall operate to supersede and cancel any prior memorandum, such supersession and cancellation to be effective as at the date hereof, subject to rights under any such prior memorandum heretofore accrued in respect to the year 1939.

Approved as of January 1, 1940.

/s/ BURNHAM ENERSEN.

Admitted November 7, 1949.

JOINT EXHIBIT 2-B

Memorandum by Participant—1941

In order to link them still more closely with the business of the firm, and to give them a direct financial interest in its welfare, recognition is accorded to certain members of our staff of attorneys, in addition to Monthly Guaranties, in certain Participating Percentages, contingent, in each case, on their remaining members of the staff throughout the calendar year. The Monthly Guaranties are to be paid in lieu of salaries. The Participating Percentages will not be computed or paid until after the close of

the calendar year. The total paid during the year by way of Monthly Guaranty is to be credited on the Participating Percentage, and settlement will be made for the balance.

The Participating Percentages are to be computed on the year's "Net Fees Before Participation." In arriving at that figure all expenses for the year are to be deducted except Monthly Guaranties paid participants and except salaries paid to partners.

In order to safeguard the provision thus made for participants, it must be stipulated that the participating privilege does not constitute participants' partners, or amount to a contract of employment on an annual or other basis or restrict the partners' freedom of action in terminating any employment at any time; that it gives the participants no voice in firm decisions or right of access to books or right to receive detailed statements, and in any question of amounts or of computations the decision of Price, Waterhouse & Co., or other certified accountants employed by the firm is to be final. Percentages are based on present conditions and it is contemplated that percentages may be changed at any time on notice to the participants affected and that other persons may be admitted to participation at any time as the partners may consider appropriate.

This memorandum is to receive the approval of the participant mentioned below and will be handed the Accounting Department for its guidance. The percentages paid participants are paid them by way of compensation only and not as parties to a joint

business venture. The Accounting Department shall treat them accordingly for income tax and all other purposes. The participants should return the amounts received in their income tax returns as "Salaries, wages, etc." and not as "Income from a partnership." The amount is to be allocated to the year in respect of which paid, even though not actually paid until the following year after the books for the year in question shall have been closed.

Mr. Enersen, having been selected as a participant, his Monthly Guaranty is fixed at \$400 beginning January 1, 1941, and his Participating Percentage is fixed at 1.75 per cent, beginning with the calendar year 1941. This memorandum shall operate to supersede and cancel any prior memorandum, such supersession and cancellation to be effective as at the date hereof, subject to rights under any such prior memorandum heretofore accrued in respect to the year 1940.

Approved as of January 1, 1941.

/s/ BURNHAM ENERSEN.

Admitted November 7, 1949.

JOINT EXHIBIT 3-C

Memorandum by Participant—1942

In order to link them still more closely with the business of the firm, and to give them a direct financial interest in its welfare, recognition is accorded to certain members of our staff of attorneys,

in addition to Monthly Guaranties, in certain Participating Percentages, contingent, in each case, on their remaining members of the staff throughout the calendar year. The Monthly Guaranties are to be paid in lieu of salaries. The Participating Percentages will not be computed or paid until after the close of the calendar year. The total paid during the year by way of Monthly Guaranty is to be credited on the Participating Percentage, and settlement will be made for the balance.

Participating Percentages are to be computed on the year's "Net Fees Before Participation." In arriving at that figure there shall be deducted all expenses for the year, including depreciation as regularly charged and including the amount, if any, by which the Monthly Guaranty paid any Participant or Participants shall exceed the amount paid or payable to such Participant or Participants as Participating Percentage. However, salaries, if any, paid to partners shall not be deducted.

In order to safeguard the provision thus made for participants, it must be stipulated that the participating privilege does not constitute participants' partners, or amount to a contract of employment on an annual or other basis or restrict the partners' freedom of action in terminating any employment at any time; that it gives the participants no voice in firm decisions or right of access to books or right to receive detailed statements, and in any question of amounts or of computations the decision of Price, Waterhouse & Co., or other certified

accountants employed by the firm is to be final. Percentages are based on present conditions and it is contemplated that percentages may be changed at any time on notice to the participants affected and that other persons may be admitted to participation at any time as the partners may consider appropriate.

This memorandum is to receive the approval of the participant mentioned below and will be handed the Accounting Department for its guidance. The percentages paid participants are paid them by way of compensation only and not as parties to a joint business venture. The Accounting Department shall treat them accordingly for income tax and all other purposes. The participants should return the amounts received in their income tax returns as "Salaries, wages, etc." and not as "Income From a Partnership." The amount is to be allocated to the year in respect of which paid, even though not actually paid until the following year after the books for the year in question shall have been closed.

Mr. Burnham Enersen, having been selected as a participant, his Monthly Guaranty is fixed at \$400.00 beginning January 1, 1942, and his Participating Percentage is fixed at 2.25 per cent, beginning with the calendar year 1942. This memorandum shall operate to supersede and cancel any prior memorandum, such supersession and cancellation to be effective as at the date hereof, subject to rights under

any such prior memorandum heretofore accrued in respect to the year 1941.

Approved as of January 1, 1942.

/s/ BURNHAM ENERSEN.

Admitted November 7, 1949.

JOINT EXHIBIT 4-D

Memorandum by Participant—1943

In order to link them still more closely with the business of the firm, and to give them a direct financial interest in its welfare, recognition is accorded to certain members of our staff of attorneys, in addition to Monthly Guaranties, in certain Participating Percentages, contingent, in each case, on their remaining members of the staff throughout the calendar year. The Monthly Guaranties are to be paid in lieu of salaries. The Participating Percentages will not be computed or paid until after the close of the calendar year. The total paid during the year by way of Monthly Guaranty is to be credited on the Participating Percentage, and settlement will be made for the balance.

Participating Percentages are to be computed on the year's "Net Fees Before Participation." In arriving at that figure there shall be deducted all expenses for the year, including depreciation as regularly charged and including the amount, if any, by which the Monthly Guaranty paid any Participant or Participants shall exceed the amount paid

or payable to such Participant or Participants as Participating Percentage. However, salaries, if any, paid to partners shall not be deducted.

In order to safeguard the provision thus made for participants, it must be stipulated that the participating privilege does not 'constitute participants' partners, or amount to a contract of employment on an annual or other basis or restrict the partners' freedom of action in terminating any employment at any time; that it gives the participants no voice in firm decisions or right of access to books or right to receive detailed statements, and in any question of amounts or of computations the decision of Price, Waterhouse & Co., or other certified accountants employed by the firm is to be final. Percentages are based on present conditions and it is contemplated that percentages may be changed at any time on notice to the participants affected and that other persons may be admitted to participation at any time as the partners may consider appropriate.

This memorandum is to receive the approval of the participant mentioned below and will be handed the Accounting Department for its guidance. The percentages paid participants are paid them by way of compensation only and not as parties to a joint business venture. The Accounting Department shall treat them accordingly for income tax and all other purposes. The participants should return the amounts received in their income tax returns as "Salaries, wages, etc.," and not as "Income From a Partnership." The amount is to be allocated to the year in respect of which paid, even though not

actually paid until the following year after the books for the year in question shall have been closed.

Mr. Burnham Enersen, having been selected as a participant, his Monthly Guaranty is fixed at \$500.00 beginning January 1, 1943, and his Participating Percentage is fixed at 2.65 per cent, beginning with the calendar year 1943. This memorandum shall operate to supersede and cancel any prior memorandum, such supersession and cancellation to be effective as at the date hereof, subject to rights under any such prior memorandum heretofore accrued in respect to the year 1942.

Approved as of January 1, 1943.

/s/ BURNHAM ENERSEN.

Admitted November 7, 1949.

Mr. Costigan: I think that that completes our case.

OPENING STATEMENT ON BEHALF OF RESPONDENT

By Mr. Crouter:

If your Honor please, I will be very brief on this. These proceedings as I view them are quite similar to the Nielson cases, which were submitted to the Court this morning, and involve a similar question. The facts are quite similar and in some respects more complete in this case, because there were written agreements relating to the employment of the Petitioner, Mr. Enersen here, in this period prior

to the time when he became a partner, and those set forth the exact compensation arrangement both as salary and with respect to participation in profits and very clearly and definitely provide that this shall not be considered as any distribution of partnership earnings, so the question will be similar to those other cases. The Commissioner's position is very similar, as in the other cases, and arises upon a similar determination by the Commissioner that Section 107 does not apply, the statement attached to the Deficiency Notice reading in part as follows: "It is held that prior to August 1, 1943, you were an employee of the partnership and did not have the right to participate in fees earned by the partnership prior to that date."

Counsel refers to some portion of the statute, being Section 107, but as the Court well knows that statute starts out and reads: "If at least 80 per centum of the total compensation for personal services covered a period 36 calendar months or more," and so forth.

Now, Respondent's position is that under these facts, and we try to include all of the facts, so that may be a little immaterial but to get the whole picture in there, the facts will show the Court that the Petitioner, Mr. Enersen, was fully compensated under his arrangement and under the contracts down to this period of August 1, 1943, when he became a partner and when he, of course, received a greater percentage than a mere employee.

Now, our taxable years, of course, are calendar years 1944 and 1945. Therefore, he did not have a

full three years' status. I will not try to discuss the facts further, because I think that is more in the nature of argument.

I would like to submit a complete photostat of the tax returns involved as the next exhibit, starting with "E," if that is agreeable at this time.

Mr. Costigan: No objection.

Mr. Crouter: 1944 income tax return of Burnham Enersen as Exhibit E.

The Court: It is received in evidence, Exhibit E.

(Whereupon the document was marked for identification as Exhibit E and was received in evidence.)

RESPONDENT'S EXHIBIT E

File this return with Collector of Internal Revenue on or before March 15, 1945. Any balance of tax due (Item 8, below) must be paid in full with return. See separate instructions for filling out return.

U. S. INDIVIDUAL INCOME TAX RETURN FOR CALENDAR YEAR 1944

1944

FORM 1040
Treasury Department
Internal Revenue Service

or fiscal year beginning _____, 1944, and ending _____, 1945

Do not write in these spaces

— CREDIT

470143

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2 (Rev.), as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than \$100 of other wages, dividends, and interest.

File
Code

714308

District

(Quoted Stamp)

MAR 13 1945

COLL. INT. RE
1st DIST. CAL

NAME BURNHAM ENERSEN
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS 2172 Green Street
(PLEASE PRINT. Street and number or rural route)

San Francisco 23, Calif. Social Security No. (if any) 545-09-5716
(City or town, postal zone number) (State)

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than \$500 who are dependent on you and more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

NAME (Please print)
Your name Burnham Enersen
Richard W. Enersen

Relationship
Son

NAME (Please print)

Relationship

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

PRINT EMPLOYER'S NAME

WHERE EMPLOYED (CITY AND STATE)

AMOUNT

3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation) 90.38

4. If you received any other income, give details on page 3 and enter the total here 6148.83

5. Add amounts in items 2, 3, and 4, and enter the total here 6239.21

If your 5 includes income of both husband and wife, show husband's income here, \$ _____; wife's income here, \$ _____

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 2. This table, which is provided by law, is based on the same tax rates as are used in the Tax Computation on page 4. The table automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 4.

IF YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 4. You may either take a standard deduction of \$500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

6. Enter your tax from table on page 2, or from line 15, page 4. 951.99

7. How much have you paid on your 1944 income tax?

(A) By withholding from your wages (Attach Withholding Receipts, Form W-2): 150.96

(B) By payments on 1944 Declaration of Estimated Tax 850.00

Enter total here → 1000.96

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here. 48.97

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here. 48.97

Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1945 estimated tax ☒

If you filed a return for a prior year, what was the latest year? 1943

To which Collector's office as it sent? San Francisco

To which Collector's office did you pay amount claimed in item 7 (B), above? San Francisco

Is your wife (or husband) making a separate return for 1944? Yes

If "Yes," write below:

Name of wife (or husband) Nida W. Enersen

Collector's office to which sent San Francisco

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return)

(Date)

Burnham Enersen

(Signature of taxpayer)

Mar. 12, 1945

(Date)

(Name of firm or employer, if any)

(If this is a joint return of husband and wife, it must be signed by both)

(SEE TAX TABLE BELOW)

16-41089-1

46

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in) \$	4. Total amount received this year \$
2. Amount received tax-free in prior years	5. Excess, if any, of line 4 over line 3
3. Remainder of your cost (line 1 less line 2) \$	6. Enter line 5, or 3 percent of line 1, whichever is greater \$

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (explain in Schedule G)
	\$	\$	\$	\$
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	\$	\$	\$	\$

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

(State (1) nature of business; (2) business name)

1. Total receipts	\$	11. Salaries and wages not included as "Labor" \$
COST OF GOODS SOLD (To be used where inventories are an income-determining factor) (Enter the letters "C," "M," or "L" on line 2 and 3 if inventories are valued at either cost, or cost or market whichever is lower)		12. Interest on business indebtedness
2. Inventory at beginning of year \$		13. Taxes on business and business property
3. Merchandise bought for sale		14. Losses (explain in Schedule G)
4. Labor		15. Bad debts arising from sales or services
5. Material and supplies		16. Depreciation, obsolescence and depletion (explain in Schedule F)
6. Other costs (explain in Schedule G)		17. Rent, repairs, and other expenses (explain in Schedule G)
7. Total of lines 2 to 6 \$		18. Amortization of emergency facilities (attach statement)
8. Less inventory at end of year		19. Net operating loss deduction (attach statement)
9. Net cost of goods sold (line 7 less line 8) \$		20. Total of lines 11 to 19 \$
10. Gross profit (line 1 less line 9) \$		21. Total of lines 9 and 20 \$
		22. Net profit (or loss) (line 1 less line 21)

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)	
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)	

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

Name and address of partnership, syndicate, etc.	McCutchen, Thomas, Matthew	Amount, \$	6148.83
Name and address of estate or trust	Griffiths & Greene	Amount,	
Other sources (state nature)		Amount,	
Total			6148.83

Total income from above sources (Enter as item 4, page 1) \$ 6148.83

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		\$	\$	\$	\$			\$

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 4, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
		\$			\$

Do not itemize deductions if—(1) You determine your tax from the tax table on page 2, or
(2) Your total income is \$5,000 or more and you claim the \$500 standard deduction.
If husband and wife living together at end of year file separate returns and one itemizes deductions, the other must file his or her return on Form 1040, and must also itemize deductions.

DEDUCTIONS

Describe deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return

Amount

Contributions

Allowable Contributions (not in excess of 15 percent of item 5, page 1)

Interest

Total Interest

Taxes

Total Taxes

Losses from fire, storm, shipwreck, or other casualty, or theft

Total Allowable Losses (not compensated by insurance or otherwise)

Medical and dental expenses

Net Expenses (not compensated by insurance or otherwise)

Enter 3 percent of item 5, page 1, and subtract from Net Expenses

Allowable Medical and Dental Expenses. See Instruction for limitation

Miscellaneous (including alimony, amortizable bond premium, special deduction for the blind, etc.)

Total Miscellaneous Deductions

TOTAL DEDUCTIONS

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 2

1. Enter amount shown in item 5, page 1. This is your Adjusted Gross Income.	\$ 6239.21
2. Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of \$500).	500.00
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income.	\$ 5739.21
4. Enter your Surtax Exemptions (\$500 for each person listed in item 1, page 1).	1000.00
5. Subtract line 4 from line 3. Enter the difference here. This is your Surtax Net Income.	\$ 4739.21
6. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 5. Enter the amount here.	\$ 1032.19
7. Copy the figure you entered on line 3, above. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions).	\$ 5739.21
8. Enter your Normal-Tax Exemption (\$500 if return includes income of only one person; otherwise see Tax Computation Instructions).	500.00
9. Subtract line 8 from line 7, and enter the difference here.	\$ 5239.21
10. Enter here 3 percent of line 9. This is your Normal Tax.	\$ 157.18
11. Add the figures on lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 15 of Schedule D)	\$ 1189.37
If you used the \$500 standard deduction in line 2, disregard lines 12, 13, & 14, and copy on line 15 the same figure you entered on line 11	
12. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116)	\$
13. Enter here any income tax paid at source on tax-free covenant bond interest	\$
14. Add the figures on lines 12 and 13 and enter the total here. Reduction under Section 107	237.38
15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax.	\$ 951.99

Form 872

Duplicate

Consent Fixing Period of Limitation Upon
Assessment of Income and Profits Tax

Dec. 30, 1947.

In pursuance of the provisions of existing Internal Revenue Laws, Burnham Enersen, a taxpayer (or taxpayers) of 2172 Green Street, San Francisco, California, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended December 31, 1944, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1949, except that, if a notice of a deficiency in

tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

/s/ BURNHAM ENERSEN,
Taxpayer.¹

[Seal²]: /s/ GEO. J. SCHOENEMAN,
Commissioner of
Internal Revenue.

By /s/ R. L. S.

Date: 12/31/47.

¹This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a Joint Return of a Husband and Wife was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

²If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

Schedule Attached to
United States Individual Income Tax Return
1944

Burnham Enersen

Note: The income reported hereon is one-half of the community income of taxpayer and wife, and all deductions shown are one-half of their total deductions. The other one-half of such income and deductions is reported on the return of taxpayer's wife, Nina W. Enersen.

Computation of Reduction in Tax under Section 107 of I.R.C.

Tax on entire income at 1944 rates (page 4, Item 11)	\$1,189.37
Adjusted Gross Income (page 4, Item 1)	\$6,239.21
Less share of partnership fees allocable to prior years	1,638.58
Balance taxable at 1944 rates	<u>\$4,600.63</u>
Tax thereon—see table	<u>766.00</u>
Portion of tax attributable to income allocated to prior years	\$ 423.37

Tax on income allocated to prior years:

Taxable Year	Income Allocated	Tax	
1943.....	\$ 403.26	\$ 97.99	
1942.....	403.25	21.57	
1941.....	391.42	49.32	
1940.....	346.45	13.72	
1939.....	94.20	3.39	
	<u>\$1,638.58</u>	<u>\$185.99</u>	185.99

Reduction in tax by use of Section 107 (page 4, Item 14)\$ 237.38

POWER OF ATTORNEY

Know All Men by These Presents:

That the undersigned, Burnham Enersen, does hereby make, constitute and appoint Henry D. Costigan, Stanley Morrison and Gordon M. Weber, the address of all of whom is 351 California Street, San Francisco, California, jointly, and each of them severally, his true and lawful attorney and attorneys, for him and in his name, place and stead, to prepare, execute and file returns and amended returns for the undersigned for the calendar years 1944 and 1945 under the Revenue Acts of the United States of America; to appear before the Treasury Department of the United States and the Bureau of Internal Revenue and other bureaus, agencies, officers and agents of said Department, before the United States Tax Court, before any board or commission, and before any court or courts of any state or of the United States, and to represent the undersigned in all matters arising out of or in any respect connected with any or all returns or amended returns heretofore or hereafter filed by him, or relating to the determination of such taxes, if any, as may be found to be due from him under any Revenue Act or Acts of the United States of America for the said calendar years 1944 and 1945; to have access to and examine all documents and data in the possession of said Treasury Department, or any bureau, agency, officer or agent of said Department, or said Tax Court, or any board or commission, or any court, with respect to the liability

of the undersigned for federal taxes under any statute of the United States imposing such taxes, and to secure therefrom any and all information relative thereto; to receive but not to endorse and collect checks in settlement of any refund made to the undersigned; to delegate any or all of the authority herein granted; to substitute another agent or attorney, or other agents or attorneys; to execute for him and on his behalf, any waiver or waivers or consent or consents agreeing to a later determination and assessment of taxes than is provided by statutes of limitations, to execute for the undersigned and on his behalf, closing agreements relative to the tax liability of the undersigned; to sign for him and on his behalf, refund, credit or abatement claims, protests, letters, petitions on appeal, pleadings and any other papers or documents whatsoever in connection with said taxes; provided that the enumeration herein of specific powers shall not be construed as a limitation upon the authority of said attorneys and each of them to do any act which the undersigned might lawfully do.

Giving and Granting unto his said attorneys, and to each of them severally, full power and authority to do and perform every act and thing whatsoever necessary or convenient to be done in the premises as fully to all intents and purposes as the undersigned might do or could do, with full power of substitution or revocation, hereby ratifying and confirming all that his said attorneys, or any of them or their substitute or substitutes, or the substitute or substitutes of any of them, shall lawfully do or

cause to be done by virtue thereof.

And the undersigned does hereby revoke all powers of attorney heretofore given for the foregoing purposes.

In Witness Whereof, the undersigned has hereunto subscribed his name, this 14th day of May, 1948.

Executed in Triplicate.

/s/ BURNHAM ENERSEN.

State of California,

City and County of San Francisco—ss.

On this 14th day of May, 1948, before me, Chalmer Munday, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Burnham Enersen, known to me to be the person described in and whose name is subscribed to and who executed the within and foregoing instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in said City and County and State the day and year in this certificate first above written.

[Seal] /s/ CHALMER MUNDAY,
Notary Public in and for the City and County of
San Francisco, State of California.

Admitted November 7, 1949.

Mr. Crouter: The 1945 return of Burnham Enersen as Exhibit F.

The Court: Received in evidence, Exhibit F.

(Whereupon the document was marked for identification as Exhibit F and was received in evidence.)

RESPONDENT'S EXHIBIT F

File this return with Collector of Internal Revenue on or before March 15, 1946. Any balance of tax due (item 8, below) must be paid in full with return. See separate instructions for filling out return.

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1945

194

or fiscal year beginning _____, 1945, and ending _____, 1946

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2, as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than \$100 of other wages, dividends, and interest.

Do not write in these spaces

File Code 851
Serial No. 3019

District 1-Calif
(Cashier's Stamp)

NAME BURNHAM ENERSEN
(PLEASE PRINT. If this return is for a husband and wife, put both first names)

ADDRESS 2172 Green Street
(PLEASE PRINT. Street and number (rural route))

San Francisco 23, California
(City or town, postal zone number) (County)

Occupation Lawyer Social Security No. 545-09-5716

REC'D WITH REMITTANCE

94 MAR 7 1946
COLL. INT. RE.
1st DIST. CAL.
NO. 15

Exemptions

AUDIT REVIEW DIVISION

By L. T. Payne

List your own name.
If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other close relatives (as defined in instruction 1) with incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Name (please print)	Relationship	Name (please print)	Relationship
<u>Mr. Burnham Enersen</u>	<u>x x x x x x</u>		
<u>Richard W. Enersen</u>	<u>Son</u>		

DATE

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1945, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming travel or reimbursed expenses, see instruction 2.

2.	Print Employer's Name	Where Employed (City and State)	Amount
			\$

Enter total here → \$

3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation) 92.

4. If you received any other income, give details on page 2 and enter the total here. 15,245.

5. Add amounts in items 2, 3, and 4, and enter the total here. 15,337.

If item 5 includes incomes of both husband and wife, show husband's income here, \$; wife's income here, \$.

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 3. You may either take a standard deduction of \$500 or itemize your deductions; whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and itemize deductions, the other must also itemize deductions.

Tax Due or Refund

6. Enter your tax from table on page 4, or from line 15, page 3. 3,406.

7. How much have you paid on your 1945 income tax?

(A) By withholding from your wages 296.71

(B) By payments on 1945 Declaration of Estimated Tax 1800.00

Enter total here → 2,096.

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here 1,310.

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here.

Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1946 estimated tax ☐

If you filed a return for a prior year, what was the latest year? 1944

To which Collector's office was it sent? San Francisco

To which Collector's office did you pay amount claimed in item 7 (B), above? San Francisco

Is your wife (or husband) making a separate return for 1945? Yes

If "Yes," write below: ("Yes" or "No")

Name of wife (or husband) Nina W. Enersen

Collector's office to which sent San Francisco

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return)

(Date)

Burnham Enersen MAR - 6
(Signature of taxpayer) (Date)

(Name of firm or employer, if any)

(If this is a joint return of husband and wife, it must be signed by both)

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Schedule A—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in)	\$	4. Total amount received this year	\$
2. Amount received tax-free in prior years		5. Excess, if any, of line 4 over line 3	
3. Remainder of your cost (line 1 less line 2)	\$	6. Enter line 5, or 3 percent of line 1, whichever is greater. (Attach separate schedule for each additional annuity or pension)	\$

Schedule B—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (explain in Schedule G)
	\$	\$	\$	\$
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	\$	\$	\$	\$

Schedule C—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

(State (1) nature of business _____; (2) business name _____)

1. Total receipts		
COST OF GOODS SOLD (To be used where inventories are an income-determining factor) (Enter the letters "C" or "I" or "M" on lines 7 and 8 if inventories are valued at either cost, or cost or market, whichever is lower)		
2. Inventory at beginning of year	\$	
3. Merchandise bought for sale		
4. Labor		
5. Material and supplies		
6. Other costs (explain in Schedule G)		
7. Total of lines 2 to 6	\$	
8. Less inventory at end of year		
9. Net cost of goods sold (line 7 less line 8)	\$	
10. Gross profit (line 1 less line 9)	\$	
OTHER BUSINESS DEDUCTIONS		
11. Salaries and wages not in line 4	\$	
12. Interest on business indebtedness		
13. Taxes on business and business property		
14. Losses (explain in Schedule G)		
15. Bad debts arising from sales or services		
16. Depreciation, obsolescence and depletion (explain in Schedule F)		
17. Rent, repairs, and other expenses (explain in Schedule G)		
18. Amortization of emergency facilities (attach statement)		
19. Net operating loss deduction (attach statement)		
20. Total of lines 11 to 19	\$	
21. Total of lines 9 and 20	\$	
22. Net profit (or loss) (line 1 less line 21)		

Schedule D—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)	
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)	

Schedule E—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

Name and address of partnership, syndicate, etc.	Deuker, Thomas, Matthew 351 California St., San Francisco	Amount, \$	15,245.00
Name and address of estate or trust		Amount, \$	
Other sources (state nature)		Amount, \$	
Total			15,245.00

Total income from above sources (Enter as item 4, page 1)

15,245.00
\$15,245.00

Schedule F—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Amount fully depreciated in one or more years	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		\$	\$	\$	\$			\$

Schedule G—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
		\$			\$

Power of Attorney

Know All Men by These Presents:

That the undersigned, Burnham Enersen, does hereby make, constitute and appoint Henry D. Costigan, Stanley Morrison and Gordon M. Weber, the address of all of whom is 351 California Street, San Francisco, California, jointly, and each of them severally, his true and lawful attorney and attorneys, for him and in his name, place and stead, to prepare, execute and file returns and amended returns for the undersigned for the calendar years 1944 and 1945 under the Revenue Acts of the United States of America; to appear before the Treasury Department of the United States and the Bureau of Internal Revenue and other bureaus, agencies, officers and agents of said Department, before the United States Tax Court, before any board or commission, and before any court or courts of any state or of the United States, and to represent the undersigned in all matters arising out of or in any respect connected with any or all returns or amended returns heretofore or hereafter filed by him, or relating to the determination of such taxes, if any, as may be found to be due from him under any Revenue Act or Acts of the United States of America for the said calendar years 1944 and 1945; to have access to and examine all documents and data in the possession of said Treasury Department, or any bureau, agency, officer or agent of said Department, or said Tax Court, or any board or commission, or any court, with respect to the

liability of the undersigned for federal taxes under any statute of the United States imposing such taxes, and to secure therefrom any and all information relative thereto; to receive but not to endorse and collect checks in settlement of any refund made to the undersigned; to delegate any or all of the authority herein granted; to substitute another agent or attorney, or other agents or attorneys; to execute for him and on his behalf, any waiver or waivers or consent or consents agreeing to a later determination and assessment of taxes than is provided by statutes of limitations, to execute for the undersigned and on his behalf, closing agreements relative to the tax liability of the undersigned; to sign for him and on his behalf, refund, credit or abatement claims, protests, letters, petitions on appeal, pleadings and any other papers or documents whatsoever in connection with said taxes; provided that the enumeration herein of specific powers shall not be construed as a limitation upon the authority of said attorneys and each of them to do any act which the undersigned might lawfully do.

Giving and Granting unto his said attorneys, and to each of them severally, full power and authority to do and perform every act and thing whatsoever necessary or convenient to be done in the premises as fully to all intents and purposes as the undersigned might do or could do, with full power of substitution or revocation, hereby ratifying and confirming all that his said attorneys, or any of them or their substitute or substitutes, or the sub-

stitute or substitutes of any of them, shall lawfully do or cause to be done by virtue thereof.

And the undersigned does hereby revoke all powers of attorney heretofore given for the foregoing purposes.

In Witness Whereof, the undersigned has hereunto subscribed his name, this 14th day of May, 1948.

Executed in Triplicate.

/s/ BURNHAM ENERSEN.

State of California,

City and County of San Francisco—ss.

On this 14th day of May, 1948, before me, Chalmer Munday, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Burnham Enersen, known to me to be the person described in and whose name is subscribed to and who executed the within and foregoing instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in said City and County and State the day and year in this certificate first above written.

[Seal] /s/ CHALMER MUNDAY,
Notary Public in and for the City and County of
San Francisco, State of California.

Schedule Attached to
United States Individual Income Tax Return
1945

Burnham Enersen

Note: The income reported hereon is one-half of the community income of taxpayer and wife, and all deductions shown are one-half of their total deductions. The other one-half of such income and deductions is reported on the return of taxpayer's wife, Nina W. Enersen.

Page 3:

One-Half
Reported
Hereon

Contributions:

Share of Firm Contributions	\$ 596.47	
Carleton College	12.00	
American Red Cross	50.00	
California State Automobile Assn.	12.00	
Commonwealth Club of California	14.00	
U. S. Coast Guard League	3.00	
Stanford Convalescent Home Auxiliary	5.00	
A. F. & A. M	4.00	
Golden Gate Kindergarten Auxiliary	3.00	
	<hr/>	
	\$ 699.47	\$ 349.74

Interest:

Richard C. Lindsay	\$ 88.50	
Bank of Montreal (S.F.)	65.02	
Bankers Life Insurance Company	42.90	
Prudential Insurance Company	37.50	
Equitable Life Assurance Soc.	32.25	
Penn Mutual Insurance Company	11.40	
New York Life Insurance Company	8.75	
	<hr/>	
	\$ 286.32	143.16

Taxes:

California Auto License and Tax	\$ 8.70	
California personal income tax:		
Nina W. Enersen	39.16	
Burnham Enersen	39.16	
San Francisco personal property tax	2.35	
California Sales Taxes (estimated)	50.00	
	<hr/>	
	\$ 139.37	69.68

Miscellaneous:

Bar Association dues:

American Bar	\$ 8.00	
California Bar	10.00	
San Francisco Bar	18.00	
Assn. of I.C.C. Practitioners	7.00	43.00

Depreciation on law books	4.11	
Safe deposit box rent and tax	4.80	
Entertainment expense*	100.00	

\$ 151.91 \$ 75.96

* Commercial Club dues and charges totalled \$365.42 for the year. At least \$100 of this amount represented the cost of entertaining clients and other business guests.

Computation of Reduction in Tax under Section 107 of I.R.C.

Tax on entire net income at 1945 rates (page 3, Item 11).....\$4,556.72

Net Income (page 3, Item 3)\$14,699.40

Less: Share of Partnership fees allocable

to prior years 4,841.98

Balance taxable at 1945 rates\$ 9,857.42

Tax thereon at 1945 rates\$2,532.24

Portion of tax attributable to income allocated to prior years....\$2,024.48

Tax on income allocated to prior years:

Taxable Year	Income Allocated	Tax
1944.....	\$1,508.42	\$385.62
1943.....	1,508.41	403.80
1942.....	699.16	37.41
1941.....	59.36	7.48
1940.....	76.62	6.21
1939.....	82.50	2.97
1938.....	78.91	2.84
1937.....	78.91	2.84
1936.....	78.91	2.84
1935.....	78.92	2.84
1934.....	157.83	5.68
1933.....	157.83	6.31
1932.....	157.83	6.31
1931.....	118.37	1.33

\$4,841.98 \$874.48

874.48

Reduction in tax pursuant to Section 107 (Page 3 - Item 14)....\$1,150.00

Deductions

Contributions

See Attachment\$349.74

Allowable Contributions (not in excess of

15 percent of item 5, page 1)\$ 349.74

Interest

See Attachment\$143.16

Total Interest 143.16

Taxes

See Attachment\$ 69.68

Total Taxes 69.68

Losses from fire, storm, shipwreck, or other casualty, or theft.

[No information shown.]

Medical and dental expenses

[No information shown.]

Miscellaneous (See Instructions)

See Attachment\$ 75.96

Total Miscellaneous Deductions 75.96

Total Deductions\$ 638.54

Tax Computation—For Persons Not Using Tax Table on Page 4

1. Enter amount shown in item 5, page 1. This is your Adjusted Gross Income\$15,337.94
2. Enter Deductions (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of \$500) 638.54
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income\$14,699.40
4. Enter your Normal-Tax Exemption (\$500 if return includes income of only one person; otherwise see Tax Computation Instructions).. 500.00
5. Subtract line 4 from line 3. Enter the difference here. (If line 3 includes partially tax-exempt interest, see Tax Computation instructions)\$14,199.40

6. Enter here 3 percent of line 5. This is your Normal Tax.
(Figure your Surtax below and enter in line 10) \$ 425.98
 7. Copy the figure you entered on line 3, above\$14,699.40
 8. Enter your Surtax Exemptions (\$500 for each
person listed in item 1, page 1) 1,000.00
 9. Subtract line 8 from line 7. Enter the dif-
ference here. This is your Surtax Net income..\$13,699.40
 10. Use the Surtax Table in instruction sheet to figure your
Surtax on amount entered on line 9. Enter the
amount here 4,130.74
 11. Add the figures on lines 6 and 10, and enter the total
here. (If alternative tax computation is made on sepa-
rate Schedule D, enter here tax from line 15 of
Schedule D)\$4,556.72
- If you used the \$500 standard deduction in line 2, disregard
lines 12, 13, and 14, and copy on line 15 the same figure
you entered on line 11.
12. Enter here any income tax payments to a foreign
country or U. S. possession (attach Form 1116).
 13. Enter here any income tax paid at source on tax-free
covenant bond interest.
 14. Reduction under Section 107 1,150.00
 15. Subtract line 14 from line 11. Enter the difference here
and in item 6, page 1. This is your tax\$3,406.72

Balfour Building,
351 California Street,
San Francisco, California.

May 14, 1948.

This Is to Certify that I have not entered into a contingent or partially contingent fee agreement for the representation before the Treasury Department of Burnham Enersen in the matter of Federal taxes for the calendar years 1944 and 1945, under the terms of a Power of Attorney filed with said Department on.....

/s/ HENRY D. COSTIGAN,

/s/ STANLEY MORRISON,

/s/ GORDON M. WEBER.

Admitted November 7, 1949.

Mr. Crouter: The 1944 return of Nina W. Enersen as Exhibit G.

The Court: Received in evidence, as Exhibit G.

(Whereupon the document was marked for identification as Exhibit G and was received in evidence.)

Mr. Crouter: And the 1945 return of Nina W. Enersen as Exhibit H.

The Court: Received in evidence as Exhibit H.

(Whereupon the document was marked for identification as Exhibit H and was received in evidence.)

Mr. Crouter: That is all and Respondent rests.

The Court: The original briefs in this proceeding will be due on January the 28th, and the reply briefs—I beg your pardon—December 28, 1949, and the reply briefs will be due on January 16, 1950.

Mr. Crouter: Thank you.

Mr. Costigan: If your Honor please, we have a little difficulty on reply briefs out here, because the Clerk of the Tax Court never sends them air mail and they often take as much as a week to reach us after they are served, and I was wondering if we could have a little more time on reply briefs, even at the expense of having less on the opening brief.

The Court: Well, the time has already been extended. Under our rules the date would be January 6 for the reply brief, but I am willing to add something to that.

If you will refer to the calendar, Mr. Baird, will you give me another ten days on that and just be sure that it doesn't fall on Sunday or Saturday.

The Clerk: The 26th, your Honor, is during the week and also the 27th.

The Court: Reply briefs will be due January 26.

Mr. Costigan: Thank you.

The Court: The case stands submitted. Thank you very much.

(Whereupon, at 2:50 o'clock p.m., the hearing in the above-entitled matter was concluded.)

Certificate

I, Franklin R. Greene, one of the official reporters of The Tax Court of the United States under its reporting contract, assigned to report certain proceedings during the session of The Tax Court in San Francisco, California, beginning November 7, 1949, do hereby Certify as follows:

That I reported all of the proceedings in the case of Burnham Enersen, Petitioner, Docket No. 20978 and Nina W. Enersen, Petitioner, Docket No. 20979, on November 7, 1949, before the Honorable Marion J. Harron, Judge of The Tax Court.

That I did well and truly, to the best of my ability, record in Stenotype fully, completely and accurately all of the proceedings which I was assigned to report, including all colloquy and statements made during the proceedings, and all questions to and answers given by witnesses;

That my stenotype record is full, complete and accurate; and

That the foregoing record is a true, complete and accurate transcript of my stenotype notes of all the proceedings which I reported, and all of the testimony which was taken in the above-entitled cause.

/s/ FRANKLIN R. GREENE,
Reporter.

Date: Nov. 23, 1949.

Filed T.C.U.S. December 7, 1949.

The Tax Court of the United States

[Title of Causes.]

Docket Nos. 20978, 20979

HENRY D. COSTIGAN, ESQ., and
GORDON M. WEBER, ESQ.,

For the Petitioners.

EARL C. CROUTER, ESQ.,

For the Respondent.

MEMORANDUM FINDINGS OF FACT
AND OPINION

Harron, Judge:

The Commissioner has determined deficiencies in
income tax as follows:

Docket No. 20978—1944	.....\$ 237.38
1945	..... 1,150.00
Docket No. 20979—1944	..... 257.38
1945	..... 983.37

These proceedings have been consolidated for trial
and opinion.

The only issue is whether the petitioner, Burnham Enersen, as a member of a law partnership is entitled to apply section 107, Internal Revenue Code, so as to include in the time of the rendition of the services the period prior to his admission to the partnership. The respondent has held that the petitioner is not entitled to receive the benefit of section 107, as amended, because he had not been a member of a partnership for 36 months.

Findings of Fact

The facts which have been stipulated are hereby found as facts. The facts which are necessary for an understanding of the question are as follows:

Burnham Enersen, hereinafter called "petitioner," and Nina W. Enersen, his wife, reside in San Francisco, California. They filed their income tax returns for the years involved with the collector for the first district of California.

Petitioner is an attorney at law. From 1930 to August 1, 1943, the petitioner was employed continuously by a law partnership in San Francisco. He was admitted to partnership in the firm on August 1, 1943, and since that date he has been a partner in the firm. Upon his admission to partnership, he became entitled to share in fees received thereafter for services rendered by the firm over periods of several years.

From the time of his first employment by the firm in 1930 or 1931 until January 1, 1940, the petitioner was paid a monthly salary plus an annual Christmas bonus amounting to a part of a month's salary. From January 1, 1940 to August 1, 1943, the amount of petitioner's compensation from the partnership was fixed in accordance with certain agreements which covered a calendar year, or portion thereof. Under these agreements, a minimum salary was guaranteed, and above the guaranteed amount a percentage of net profits was paid. During the years 1940, 1941, 1942, and 1943, up to August first, the petitioner received the guaranteed

salary, plus a percentage of profits at the end of each year.

From and after August 1, 1943, the petitioner as a partner in the partnership, has at all times received a specified percentage of the net profits of the partnership, namely, $3\frac{1}{2}$ per cent from August 1, 1943, to December 30, 1945. The percentage was increased to 5.4571 per cent on December 31, 1945.

The petitioner and his wife and the law partnership have at all times followed the cash method of accounting in the keeping of accounts and the making of income tax returns; and, also, have made their respective tax returns on a calendar year basis.

During 1944 and 1945, the partnership received fees from clients of which 80 per cent of the fees received in each of those years represented compensation for personal services of the firm to clients which had been rendered by the firm over a period of 36 months or more. In the case of the largest amount of such fees which the firm received in 1944, petitioner had performed services for clients in the matters involved during the period from January, 1940 to January, 1944; and in the case of the largest amount of such fees received in 1945, petitioner had performed services for the clients involved during the period from September, 1943, to December, 1945. In accordance with agreed percentages for the sharing in such fees by partners and employees who were employed on a percentage-of-profits basis, the petitioner received \$3,561.13 in 1944; and \$10,791.68 in 1945, as his share of the above fees which the firm received in 1944 and

1945; i.e., of fees for personal services performed over periods of 36 months or more of which fees, 80 per cent or more, were received in a single taxable year.

The petitioner and his wife were married in 1935, and have resided together in California since their marriage, including the years 1944 and 1945. The above amounts of the shares of the petitioner in the fees above described which were received in 1944 and 1945, constituted community property acquired subsequent to 1927.

Opinion

The petitioner reported his income and computed his tax for the years 1944 and 1945 under the provisions of section 107, Internal Revenue Code, as amended, as though the payments in question (aggregating \$3,561.33 in 1944, and \$10,791.68 in 1945) had been received by him ratably over the period during which the services had been rendered.

He also took into consideration in making the ratable allocation the fact that during the period 1935 through 1945, he was married and his income was part of the community property of himself and his wife; but with respect to this aspect of the issue in this proceeding, no issue is presented.

The respondent, in the notice of deficiency, determined that the entire amount of the shares of petitioner in the fees which were received in 1944 and 1945 were taxable in 1944 and 1945 as ordinary income received in full in those years, upon his holding that the petitioner did not qualify for relief

under section 107(a) with respect to fees earned since August 1, 1943, because the period of the petitioner's membership in the partnership was less than 36 calendar months. The respondent has not questioned the allocation of the income in question over prior years, so that we assume that if the question presented is decided in the petitioners' favor, there are no deficiencies in the taxable years.

The question presented is whether section 107, in the form in which it was applicable to the years before us, contemplates allocation of compensation for personal services rendered by a partnership over the entire period of rendition of the services, notwithstanding that the taxpayer-partner who shares in the compensation was not a member of the partnership during all of that period.

The same question was presented for decision in the proceeding of Elder W. Marshall, et al., Docket Nos. 23432 and 23433. Our opinion in that proceeding was promulgated on January 27, 1950. See 14 T.C. No. 12. There, as here, the respondent eliminated the entire amount of the share of the taxpayer in fees from the scope of section 107 on the ground that by the end of the year in which the income was received, the taxpayer had not actually been a member of a law firm for the 36-month period which the statute prescribes.

The facts in this proceeding present an even stronger case for the petitioner than did the facts in the Marshall case, because in this proceeding the taxpayer rendered services over a period of several years for which the fees in which he shared, in 1944

and 1945, were paid by clients as compensation for personal services; and, also, he has been associated with the law firm in question throughout the period of years over which he seeks to allocate the income in question.

In *Elder W. Marshall, supra*, this Court rejected the same argument which the respondent has advanced in this proceeding. In so doing, we took into consideration the language of section 107 before and after the 1942 amendment, and the Congressional intent as shown by Senate Report No. 1631, 77th Cong., 2d sess., 109, to which the petitioner calls attention. It is unnecessary to repeat here what we have said in the Opinion in the proceeding of *Elder W. Marshall, supra*. It is held, therefore, that the respondent's determination in this proceeding whereby he has eliminated allocation where the partnership status did not extend over three years is erroneous. As we said in *Elder W. Marshall, supra*:

Since it is the status of the recipient of the income in the year of receipt, and not either his status in prior years, *Federico Stallforth*, 6 T.C. 140, nor the identity of the individual who contributed the services, that is made to govern the application of section 107 in its present form, we are satisfied that under the facts of this proceeding petitioner correctly computed his tax by use of its provisions.

Decisions will be entered that there are no deficiencies.

[Seal].

Received T.C.U.S. January 18, 1950.

Entered Jan. 26, 1950.

The Tax Court of the United States
Washington

Docket No. 20978

BURNHAM ENERSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in the Memorandum Findings of Fact and Opinion, entered on January 26, 1950, it is

Ordered and Decided: That there are no deficiencies in income tax for the years 1944 and 1945.

[Seal] /s/ MARION J. HARRON,
Judge.

Entered Jan. 27, 1950.

Served Jan. 27, 1950.

The Tax Court of the United States

Washington

Docket No. 20979

NINA W. ENERSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its the Memorandum Findings of Fact and Opinion, entered on January 26, 1950, it is

Ordered and Decided: That there are no deficiencies in income tax for the years 1944 and 1945.

[Seal] /s/ MARION J. HARRON,
Judge.

Entered Jan. 27, 1950.

Served Jan. 27, 1950.

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 20978

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

BURNHAM ENERSEN,
Respondent on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States Court
of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on January 27, 1950, ordering and deciding that there are no deficiencies in income tax for the years 1944 and 1945. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent, Burnham Enersen, and Nina W. Enersen, his wife, reside in San Francisco, California. They filed their Federal income tax returns for the calendar years 1944 and 1945 with the Collector of Internal Revenue for the First District of California, whose office is located at San Francisco, California, and within the judicial circuit of the United States Court of Appeals for the Ninth Circuit, where this review is sought.

Nature of Controversy

The issue is whether the taxpayer, Burnham Enersen, as a member of a law partnership is entitled to apply Section 107, Internal Revenue Code, so as to include in the time of the rendition of the services the period prior to his admission to the partnership.

The taxpayer, Burnham Enersen, is an attorney at law. From 1930 to August 1, 1943, he was employed continuously by a law partnership in San Francisco. He was admitted to partnership in the firm on August 1, 1943, and since that date he has been a partner in the firm. Upon his admission to partnership, he became entitled to share in fees received thereafter for services rendered by the firm over periods of several years. The taxpayer received \$3,561.13 in 1944 and \$10,791.68 in 1945 as his share of the fees which the firm received in 1944 and 1945; i.e., of fees for personal services performed over periods of 36 months or more of which fees, 80 per cent or more, were received in a single taxable year.

The taxpayer reported his income and computed his tax for the years 1944 and 1945 under the provisions of Section 107, Internal Revenue Code, as amended, as though the payments in question had been received by him ratably over the period during which the services had been rendered. The Commissioner determined that the entire amount of the shares of taxpayer in the fees which were received in 1944 and 1945 were taxable in 1944 and 1945 as ordinary income received in full in those years, for the reason that the taxpayer did not qualify for re-

lief under Section 107(a) with respect to fees earned since August 1, 1943, because the period of taxpayer's membership in the partnership was less than 36 calendar months.

The Tax Court, however, decided in favor of the taxpayer on the authority of its decision in *Elder W. Marshall, et al.*, 14 T. C. No. 12, and held that the Commissioner's determination whereby he has eliminated allocation where the partnership status did not extend over three years is erroneous.

/s/ THERON L. CAUDLE, C.A.R.,
Assistant Attorney General.

/s/ CHARLES OLIPHANT, C.A.R.,

Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review.

Received and Filed T. C. U. S. April 21, 1950.

[Title of Court of Appeals and Cause.]

Docket No. 20978

NOTICE OF
FILING PETITION FOR REVIEW

To: Mr. Burnham Enersen,
2642 Baker Street,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of April, 1950, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for

the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of April, 1950.

/s/ CHARLES OLIPHANT, C.A.R.,
Chief Counsel, Bureau of Internal Revenue, Coun-
sel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 24th day of April, 1950.

/s/ BURNHAM ENERSEN,
Respondent on Review.

Received and Filed T. C. U. S. May 5, 1950.

[Title of Court of Appeals and Cause.]

Docket No. 20978

NOTICE OF
FILING PETITION FOR REVIEW

To: Henry D. Costigan, Esq.,
Gordon M. Weber, Esq.,
1500 Balfour Building,
San Francisco 4, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of April, 1950, file with the Clerk of The Tax Court of the

United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of April, 1950.

/s/ CHARLES OLIPHANT, C.A.R.,
Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 24th day of April, 1950.

/s/ HENRY D. COSTIGAN,
Counsel for Respondent on Review.

Received and Filed T. C. U. S. May 5, 1950.

[Title of District Court and Cause.]

Docket No. 20979

PETITION FOR REVIEW

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on January 27, 1950, ordering and deciding that there are no deficiencies

in income tax for the years 1944 and 1945. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent, Nina W. Enersen, and Burnham Enersen, her husband, reside in San Francisco, California. They filed their Federal income tax returns for the calendar years 1944 and 1945 with the Collector of Internal Revenue for the First District of California, whose office is located at San Francisco, California, and within the judicial circuit of the United States Court of Appeals for the Ninth Circuit, where this review is sought.

Nature of Controversy

The issue is whether taxpayer's husband, Burnham Enersen, as a member of a law partnership is entitled to apply Section 107, Internal Revenue Code, so as to include in the time of the rendition of the services the period prior to his admission to the partnership.

The taxpayer's husband, Burnham Enersen, is an attorney at law. From 1930 to August 1, 1943, he was employed continuously by a law partnership in San Francisco. He was admitted to partnership in the firm on August 1, 1943, and since that date he has been a partner in the firm. Upon his admission to partnership, he became entitled to share in fees received thereafter for services rendered by the firm over periods of several years. Burnham Enersen received \$3,561.13 in 1944 and \$10,791.68 in 1945 as his share of the fees which the firm received in 1944

and 1945; i.e., of fees for personal services performed over periods of 36 months or more of which fees, 80 per cent or more, were received in a single taxable year.

The income in question constituted community property, and the taxpayer and her husband reported their income and computed their tax for the years 1944 and 1945 under the provisions of Section 107, Internal Revenue Code, as amended, as though the payments in question had been received ratably over the period during which the services had been rendered. The Commissioner determined that the income in question was taxable in 1944 and 1945 as ordinary income received in full in those years, for the reason that the taxpayer and her husband did not qualify for relief under Section 107(a) with respect to fees earned since August 1, 1943, because the period of Burnham Enersen's membership in the partnership was less than 36 calendar months.

The Tax Court, however, decided in favor of the taxpayer on the authority of its decision in *Elder W. Marshall, et al.*, 14 T. C. No. 12, and held that the Commissioner's determination whereby he had eliminated allocation where the partnership status did not extend over three years is erroneous.

/s/ THERON L. CAUDLE, C.A.R.,
Assistant Attorney General.

/s/ CHARLES OLIPHANT, C.A.R.,
Chief Counsel, Bureau of Internal Revenue, Counsel
for Petitioner on Review.

Received and Filed T. C. U. S. April 21, 1950.

[Title of Court of Appeals and Cause.]

Docket No. 20979

NOTICE OF
FILING PETITION FOR REVIEW

To: Mrs. Nina W. Enersen,
2642 Baker Street,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of April, 1950, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of April, 1950.

/s/ CHARLES OLIPHANT, C.A.R.,
Chief Counsel, Bureau of Internal Revenue, Counsel
for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 24th day of April, 1950.

/s/ NINA W. ENERSEN,
Respondent on Review.

Received and Filed T. C. U. S. May 5, 1950.

[Title of Court of Appeals and Cause.]

Docket No. 20979

NOTICE OF
FILING PETITION FOR REVIEW

To: Henry D. Costigan, Esq.,
Gordon M. Weber, Esq.,
1500 Balfour Building,
San Francisco 4, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of April, 1950, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of April, 1950.

/s/ CHARLES OLIPHANT, C.A.R.,
Chief Counsel, Bureau of Internal Revenue, Counsel
for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 25th day of April, 1950.

/s/ GORDON M. WILEY,
Counsel for Respondent on
Review.

Received and Filed T. C. U. S. May 5, 1950.

[Title of Court of Appeals and Cause.]

Docket Nos. 20978, 20979

MOTION

Comes Now the Commissioner of Internal Revenue, petitioner on review in the above-entitled causes, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and moves that the time within which to complete and transmit the record on review be extended from May 31, 1950, to and including July 20, 1950, and for cause respectfully represents:

That the question as to whether the petitions for review will be further prosecuted is under consideration and therefore additional time is required in order to complete this consideration and also if necessary to properly stipulate the omissions, if any, from the record on review, to prepare the record and to transmit it to the Court of Appeals.

Wherefore, it is prayed that this motion be granted.

/s/ CHARLES OLIPHANT, C.A.R.,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

J. M. MORAWSKI,
Special Attorney,
Bureau of Internal Revenue.

Received and Filed T. C. U. S. May 24, 1950.

The Tax Court of the United States
Washington

Dockets Nos. 20978, 20979

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

BURNHAM ENERSEN, NINA W. ENERSEN,
Respondents.

ORDER ENLARGING TIME

Upon motion of counsel for petitioner, it is

Ordered that the time for preparation, transmission and delivery of the record sur petition for review of the above-entitled proceeding in the United States Court of Appeals for the Ninth Circuit is extended to July 20, 1950.

[Seal] /s/ JOHN W. KERN,
Presiding Judge.

Dated: Washington, D. C., May 24, 1950.

Served May 26, 1950.

United States Court of Appeals
for the Ninth Circuit

Docket Nos. 20978, 20979

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

BURNHAM ENERSEN, NINA W. ENERSEN,
Respondents on Review.

STATEMENT OF POINTS

Comes Now the petitioner on review herein and makes this concise statement of points on which he intends to rely on the review herein, to wit:
The Tax Court of the United States erred:

1. In holding that the payments in question (aggregating \$3,561.13 for 1944 and \$10,791.68 in 1945), which were received by Burnham Enersen as his share of certain partnership fees, are subject to tax under the provisions of Section 107, Internal Revenue Code, on the authority of the Tax Court's decision in *Elder W. Marshall, et al.*, 14 T. C. No. 12.

2. In failing to uphold the Commissioner's determination that the income in question was taxable as ordinary income in the year received, without the benefits of the relief provided by Section 107, Internal Revenue Code, since Burnham Enersen's membership in the partnership was less than 36 calendar months.

3. In holding in each case that there are no deficiencies in income tax for 1944 and 1945; and in failing to withhold the deficiencies determined by the Commissioner for 1944 and 1945 in the respective amounts of \$237.38 and \$1,150.00 in the case of Burnham Enersen and \$257.38 and \$983.47 in the case of Nina W. Enersen.

4. In that its decisions are not supported by the evidence.

5. In that its decisions are contrary to law and regulations.

/s/ THERON L. CAUDLE, C.A.R.,
Assistant Attorney General.

/s/ CHARLES OLIPHANT, C.A.R.,
Chief Counsel, Bureau of Internal Revenue. Counsel for Petitioner on Review.

Service of a copy of the within statement of points is hereby admitted this 7th day of June, 1950.

/s/ HENRY S. COSTIGAN,
/s/ GORDON M. WEBER,
Attorneys for Respondents on
Review

Received and Filed T. C. U. S. July 3, 1950.

[Title of Court of Appeals and Cause.]

Docket Nos. 20978 and 20979

STATEMENT RE DIMINUTION OF RECORD

To the Clerk of the Tax Court of the United States:

Pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure adopted by the United States Court of Appeals for the Ninth Circuit, you are hereby notified that the petitioner on review will not exclude or omit any part of the record in these proceedings which were consolidated for hearing and opinion by the Tax Court.

/s/ THERON L. CAUDLE, C.A.R.,
Assistant Attorney General.

/s/ CHARLES OLIPHANT, C.A.R.,
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Service of a copy of this Statement Re Diminution of Record is hereby acknowledged this 7th day of June, 1950.

/s/ HENRY S. COSTIGAN,

/s/ GORDON M. WEBER,
Attorneys for Respondents on Review.

Received and Filed T. C. U. S. July 3, 1950.

The Tax Court of the United States
Washington

Docket Nos. 20978 and 20979

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

BURNHAM ENERSEN, NINA W. ENERSEN,
Respondent on Review.

CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 30, inclusive, constitute and are all of the papers and proceedings on file in my office as the original and complete record in the proceedings before the Tax Court of the United States entitled, "Burnham Enersen, Petitioner, v. Commissioner of Internal Revenue, Respondent," Docket No. 20978, and "Nina W. Enersen, Petitioner, v. Commissioner of Internal Revenue, Respondent," Docket No. 20979, and in which the respondents in the Tax Court proceedings have initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 7th day of July, 1950.

[Seal] /s/ VICTOR S. MERSCH,
Clerk.

[Endorsed]: No. 12610. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Burnham Enersen and Nina W. Enersen, Respondents. Transcript of the Record. Upon Petitions to Review Decisions of the Tax Court of the United States.

Filed July 14, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12610

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

BURNHAM ENERSEN,
Respondent.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner.

vs.

NINA W. ENERSEN,
Respondent.

NOTICE AS TO STATEMENT OF POINTS TO
BE RELIED UPON AND AS TO PARTS
OF RECORD TO BE PRINTED

Pursuant to Rule 19(6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, notice is hereby given by the Commissioner of Internal Revenue, petitioner on review herein, as follows:

1. The Commissioner hereby adopts, as the Statement of Points upon which he intends to rely on the present review, the Statement of Points heretofore filed and served and included in the certified typewritten transcript of record filed in this Court in this cause; and

2. The Comissioner hereby designates for printing the entire transcript of record filed in this Court in this cause.

Dated this 27th day of July, 1950.

/s/ THERON LAMAR CAUDLE,
Assistant Attorney General, Counsel for Petitioner
on Review.

[Endorsed]: Filed U. S. C. A. July 31, 1950.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO PARTS OF THE
RECORD TO BE PRINTED

1. Pursuant to Rule 19(6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, it is hereby stipulated and agreed by and between the parties to this cause, through their respective counsel, that, in lieu of the parts of the record heretofore designated for printing by the petitioner on review by his notice dated July 27, 1950, heretofore served and filed in this cause in this Court, only the following parts of the transcript of record filed in this Court in this cause be printed, as material to the consideration of the review:

	Document No.*
(a) Docket Entries in T. C. Docket #20978...	1
(b) Docket Entries in T. C. Docket #20979...	2
(c) Petition in T. C. Docket #20978.....	3
(d) Answer in T. C. Docket #20978.....	5
(e) Stipulation of Facts in T. C. Docket Nos. 20978 and 20979.....	14
(f) Joint Exhibits 1-A thru 4-D Attached to Stipulation of Facts.....	15
(g) Respondent's Exhibit E and F (part of Document No. 16)	16
(h) Official Report of Proceedings in T. C. Docket Nos. 20978 and 20979.....	17
(i) Memorandum Findings of Fact and Opinion in T. C. Docket Nos. 20978 and 20979....	22
(j) Decision in T. C. Docket #20978.....	23
(k) Decision in T. C. Docket #20979.....	24
(l) Petition for Review and Proofs of Service in T. C. Docket #20978.....	25
(m) Petition for Review and Proofs of Service in T. C. Docket #20979.....	26

*This refers to the number given to the respective parts of the transcript of record on review by the Clerk of the Tax Court in transmitting it to the Clerk of the Court of Appeals.

(n) Motion for Extension of Time to Prepare Record on Review in T. C. Docket Nos. 20978 and 20979.....	27
(o) Order Enlarging Time to Prepare and Transmit Record in T. C. Docket Nos. 20978 and 20979.....	28
(p) Statement of Points in T. C. Docket Nos. 20978 and 20979.....	29
(q) Statement re Diminution of Record in T. C. Docket Nos. 20978 and 20979.....	30
(r) Certificate and Seal	

2. It is further agreed that, except for immaterial minor differences, the petition, with Exhibit A thereto, and the answer in the case of *Nina W. Enersen v. Commissioner*, T. C. Docket No. 20979, are identical to those in the case of *Burnham Enersen v. Commissioner*, T. C. Docket No. 20978, and it is therefore agreed that they be omitted from the printed record. It is further agreed that Respondent's Exhibits G and H are copies of the income tax returns of Nina W. Enersen for the years 1944 and 1945, respectively, and that they, except for immaterial minor differences, are identical to Respondent's Exhibits E and F, the respective income tax returns of Burnham Enersen for those years, and it is therefore agreed that they be omitted from the printed record.

3. It is further agreed that there also be in-

cluded in the printed record the following documents filed in this Court:

(a) Notice as to Statement of Points, etc., filed by Petitioner on Review.

(b) This Stipulation.

/s/ THERON LAMAR CAUDLE,
Assistant Attorney General, Counsel for Petitioner
on Review.

/s/ HENRY S. COSTIGAN,
Counsel for Respondent on
Review.

Dated this 17th day of August, 1950.

[Endorsed]: Filed U. S. C. A. August 22, 1950.

